INDEX

CITATIONS

387-271—69——1

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE UNITED STATES, AND EVERETT T. CARPENTER, POSTMASTER OF THE CITY OF LOS ANGELES, STATE OF CALIFORNIA, APPELLANTS

v.

TONY RIZZI, D/B/A THE MAIL BOX

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No.

UNITED STATES OF AMERICA AND THE POSTMASTER GENERAL, APPELLANTS

v.

THE BOOK BIN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the Central District of Cali-

fornia (App. A, *infra*, pp. 15–17) (*The Mail Box*) is not yet reported. The opinion of the United States District Court for the Northern District of Georgia (App. B, *infra*, pp. 46–56) (*Book Bin*) is not yet reported.

JURISDICTION

The judgment of the three-judge district court in *The Mail Box* declaring 39 U.S.C. 4006 unconstitutional and enjoining the Postmaster General and the Postmaster of Los Angeles from enforcing an order thereunder was entered on August 1, 1969 (App. A, p. 21). A notice of appeal was filed on September 2, 1969.

The judgment of the three-judge district court in *Book Bin* dismissing the action brought by the United States for an order pursuant to 39 U.S.C. 4007, enjoining the Postmaster General from conducting proceedings pursuant to 39 U.S.C. 4006, and declaring 39 U.S.C. 4006 and 4007 unconstitutional was entered on October 16, 1969 (App. B, p. 57). A notice of appeal was filed that day.

The jurisdiction of this Court over both appeals is conferred by 28 U.S.C. 1252 and 1253. *Zemel* v. *Rusk*, 381 U.S. 1.

QUESTIONS PRESENTED

1. Whether 39 U.S.C. 4006 is unconstitutional on its face.

2. Whether 39 U.S.C. 4007 is unconstitutional when invoked in aid of proceedings for the enforcement of 39 U.S.C. 4006.

STATUTES AND REGULATIONS INVOLVED

Sections 4006 and 4007 of Title 39, together with the Post Office Department regulations relevant to their use, are set out in Appendix C, *infra*, pp. 58 ff.

STATEMENT

The Mail Box and The Book Bin are alleged to be the retail distributors of picture magazines consisting almost entirely of photographs of women exposing their pudenda. The two distributors allegedly use the United States mails to disseminate illustrated advertisements for the magazines, to receive orders for them, and to effect their distribution. Both distributors were subjected to administrative actions seeking to invoke the remedies of 39 U.S.C. 4006, 4007, as to some of the magazines they publish, on the ground that the magazines were obscene.

Under 39 U.S.C. 4006, the Postmaster General may stamp as "unlawful" and return to the senders letters addressed to a person, and may prohibit the payment of postal money orders to that person, if he finds, on "evidence satisfactory to [him]," that the person is obtaining or seeking money through the mails for "an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance" or is using the mails to distribute information as to how such items may be obtained. The provision is parallel to, and is administered in the identical manner as, 39 U.S.C. 4005, relating to the use of the mails to promote frauds and lotteries. See *Donaldson* v. *Read Magazine*, 333 U.S. 178. Administrative procedures applicable to both sections, 39 C.F.R. 952.1 *et seq.*, stress the

need for expedition, *e.g.*, *id.* at 952.7, 952.13, 952.24(a), and comply with the Administrative Procedure Act.[1] Under these procedures, an order does not take effect until the administrative proceedings have been concluded, *id.* at 952.28, but the Post Office is not required to seek judicial enforcement.

Section 4007 is a general provision applicable to both Section 4006 and Section 4005, and establishes a procedure by which the Postmaster General may secure interim relief during the pendency of administrative proceedings. It authorizes the United States District Court for the district in which a person receives mail to direct the temporary detention of the person's incoming mail "pending the conclusion of the statutory proceedings and any appeal therefrom" upon a showing of probable cause to believe that the statute is being violated. It further provides that the determination under the section "does not affect or determine any fact at issue in the statutory proceedings."

In both of the present cases, the Postmaster General initiated administrative proceedings under Section 4006 and at the same time commenced actions in the appropriate district court for a Section 4007 order directing the temporary detention of mail pending completion of the administrative proceedings. In *The Mail Box,* the United States District Court for the

[1] Thus, the regulations provide for written complaint and notice of hearing, 952.5, 952.7, 952.8, a trial-type administrative proceeding, 952.9–952.22, before an impartial hearing examiner, 952.17, 39 U.S.C. 308a, 39 C.F.R. 821.3(c)(1), a written opinion, 952.23–952.24, and an administrative appeal, 952.25.

Central District of California granted a temporary restraining order to that effect December 3, 1968, and a preliminary injunction December 18, 1968; the administrative proceedings were concluded December 31, 1968, by a finding of the Judicial Officer that the magazines there involved were obscene. App. A, pp. 23-41, *infra*. Section 4006 orders were entered accordingly, App. A, pp. 41–45, *infra*, and appellee Rizzi then brought the present action for injunctive relief against enforcement of the order and Section 4006 generally. A three-judge district court was convened and ruled in Rizzi's favor solely on the ground that Section 4006 is unconstitutional on its face.

In *Book Bin*, the appellee counterclaimed to the government's action for a Section 4007 order in the United States District Court for the Northern District of Georgia, seeking an injunction against enforcement of that section and Section 4006 on constitutional grounds. A three-judge district court was convened and granted the relief appellee requested, again solely on the ground that the two provisions are unconstitutional.

In each case, the court held the statute unconstitutional principally in reliance on *Freedman* v. *Maryland*, 380 U.S. 51, where this Court invalidated a State motion picture censorship system under which the State administratively could prohibit the exhibition of unlicensed motion pictures without a prior, prompt judicial determination of obscenity.

THE QUESTIONS ARE SUBSTANTIAL

In these cases, lower federal courts have struck down on First Amendment grounds an important Act

of Congress designed to effectuate a proper legislative purpose, namely, curbing the commercial exploitation of pornographic matter through the mails.[2] Plenary review by this Court is manifestly appropriate, especially since the same statutory arrangement has repeatedly been approved by this Court as applied to lotteries and frauds carried through the mails. *E.g., Donaldson* v. *Read Magazine,* 333 U.S. 178; *Public Clearing House* v. *Coyne,* 194 U.S. 497. This Court has recognized that, like speech or writing which perpetrates a fraud, *ibid.,* and commercial advertising generally, *Valentine* v. *Chrestensen,* 316 U.S. 52, 54, ostensible "speech" commercially exploitative of a prurient interest in sex is subject to regulation. *Roth* v. *United States,* 354 U.S. 476; *Ginzburg* v. *United States,* 383 U.S. 463. While the fact that obscenity is subject to regulation could not save an overly broad statute, or one that failed to provide for timely judicial participation, we believe the courts below overlooked significant differences between the procedures involved in these cases and the prior decisions of this Court on which they relied in deciding that the flaws of overbreadth and failure to involve the judiciary were present here.

1. The objections to Section 4006 were that it fails to provide for prompt, judicial resolution of the question of obscenity, *Freedman* v. *Maryland,* 380 U.S. 51, and that it chills the publication of protected speech

[2] In *United States* v. *Hiett*, pending on petition for certiorari, No. 762, this Term, a lower court held unconstitutional, also on First Amendment grounds, another federal statute relating to the use of the mails.

by threatening the withholding of remittances during the period between the administrative determination of obscenity and judicial review. But this is not a case like *Freedman,* where a Board created only for the purpose of censorship was to examine and approve any movie before it could be shown. The Post Office was not created for the business of censorship. Here, an impartial judicial officer,[3] in a hearing affording all elements of administrative due process, must be persuaded that the matter in question is affirmatively obscene before any administrative action can be taken. While the subsequent judicial review proceedings would be limited to the administrative record, the regulations make clear that that record will be full and precise, 39 C.F.R. 952.18–952.22, and that there will be as full an exposition of the hearing officer's reasoning as would result from a trial in district court. 39 C.F.R. 952.24. Moreover, on review the court would have the same freedom and responsibility as this Court traditionally exercises in obscenity cases to review for itself the materials in question and determine whether they could support the determination made. The procedure thus affords all the essentials of judicial determination of the obscenity issue.

We believe this may suffice to demonstrate the constitutionality of the statute. If serious question remains, however, regarding the fact and timing of judicial involvement in its enforcement, there is a limiting construction available to meet those doubts and thus avoid

[3] The hearing officer may be either a federal hearing examiner or the Department's Judicial Officer, 39 C.F.R. 952.17. In the latter event, there is ordinarily no administrative appeal.

invalidating the entire scheme. In enacting what is now Section 4007 in 1960, the Congress considered but rejected a request by the Postmaster General to make clear that appeal proceedings would not operate as a stay of a Section 4006 order in cases where interim judicial intervention under Section 4007 either had not been sought or had been denied. S. Rep. No. 1818, 86th Cong., 2d Sess. (1960), p. 5. Section 4007 authorizes an order of temporary detention to be in effect "pending the conclusion of the statutory proceedings *and any appeal therefrom*" (emphasis supplied). On the floor of the Senate, its sponsor stressed that "The bill places the responsibility for the detention of mail upon the courts instead of on an appointive officer," 106 Cong. Rec. 15428 (1960), and expressed a general desire to create a statutory procedure which would meet constitutional requirements while permitting effective regulation of use of the mails for commercial dealings in pornography.

In these circumstances, and to avoid constitutional doubts, we believe it would be appropriate to treat any appeal of a Section 4006 order as automatically staying its effect, where a Section 4007 judicial order for temporary detention of mail was not then in effect.[4] While this construction does require the mailer to take the initiative of filing an appeal from the administrative order, we do not believe that a burden so slight taints the statutory scheme. Under this construction, there would be practical assurance that ad-

[4] In the absence of such doubts, for example under Section 4005, no such construction would be necessary or appropriate.

ministrative action would have no effect until it received judicial endorsement. Unlike *Freedman,* where the movie could not be released until approval was obtained, appellees would continue to receive mail until a block was judicially ordered.

2. The attack on Section 4007 is premised chiefly on the contention that the finding of "probable cause" which that statute requires to justify a temporary mail detention order is insufficient to justify the effect of such an order on the exercise of First Amendment rights. Again, however, a limiting construction would be available to avoid any doubts. This construction would require that, in order to determine whether or not "probable cause" exists, the district judge examine the articles, remittances for which are sought to be blocked. While the proceeding is not adversary in the full sense, the judge's examination of the materials themselves can be as thorough as if he were passing on the merits. Since this Court has indicated that there is only a limited class of material which permissibly may be deemed obscene, a class which in the main is identifiable upon examination, *e.g., Redrup* v. *New York,* 386 U.S. 767, it would be possible to require the judge passing on the issue of probable cause to determine whether or not, on its face, the material is in that class. To be sure, there would remain the possibility that "redeeming social importance" or some other saving characteristic not apparent on the face of the materials themselves would appear at the hearing on the merits; but in view of the present judicial definition of constitu-

tionally proscribable obscenity, that possibility is slight as to any material which, upon inspection, *prima facie* is in the proscribable class.[5]

3. Finally, there is the question whether the statutes impermissibly chill the exercise of protected First Amendment rights. The Georgia district court appears to have found such a chill in two respects: first, in discouraging commercial publication of materials through the prospect that receipt of proceeds for those materials would be blocked; and second, by requiring the person subject to a temporary or permanent mail block to come forward and identify mail *not* subject to the block in order to receive it.

If the procedures of Sections 4006 and 4007 are not impermissibly vague, and meet the requirements of judicial determination of obscenity and expedition of procedure following adverse action,[6] their enforce-

[5] Under the Post Office rules, the hearing on the merits would be concluded and a determination made within a very short time after a Section 4007 order was entered. In *The Mail Box*, for example, less than 30 days elapsed. The matter is in any event subject to the control of the district judge issuing the temporary order. It would be appropriate, for example, for him to review his order upon a defendant's motion after conclusion of administrative proceedings resulting in a mail block order, and to determine whether it should remain in effect during the appeal.

[6] Although the issue is not presented on the facts here, there appears to be some question whether the *Freedman* requirement of promptness applies to all proceedings involving obscenity questions, or only to those following some official action which, as in *Freedman*, prevents further publication until obscenity questions are resolved. We would argue that the requirement applies only where speech is actually blocked—for example, that there is no obligation of speedier trial of criminal obscenity prosecutions than other criminal prosecutions. Accordingly, Sec-

ment could not be blocked simply because persons subject to them feared their use. The logic of such an argument would equally foreclose criminal prosecution for sale of obscene matter; the point is that Congress is entitled to chill publication by persons who violate the obscenity laws so long as it does so in language sufficiently precise, as it has here. Indeed, this Court has held that in the area of commercial exploitation of pornography, materials may be the basis of prosecution or restraint even though the materials in themselves "cannot be adjudged obscene in the abstract." *Ginzburg* v. *United States,* 383 U.S. 463, 474.

In finding the requirement to come forward and identify unblocked mail objectionable, the courts below relied principally on *Lamont* v. *Postmaster General,* 381 U.S. 301. But there are significant differences between that case, which involved no unlawful activity on the recipient's part, and these, where the mail block is imposed only after an adjudication of the existence or likely existence of behavior which Congress constitutionally may declare unlawful, *Roth, supra.* Whether Congress constitutionally may thus close the mails to commerce in obscenity is at least an open question, *Manual Enterprises, Inc.* v. *Day,* 370 U.S.

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tion 4006 presents no problems of promptness on our reading, since an appealed order under that section would never be enforced prior to judicial decision of the appeal. A Section 4007 order is obtained through judicial process, and appealable as any preliminary injunction would be; as noted above, n. 5, the determination on the merits which the Post Office must make will occur within a very short time after such an order is entered.

478, 512, 518 (Brennan, J., concurring) too significant to be deemed to have been decided *sub silentio* in *Lamont*. If Congress can thus close the mails, then it must be able to take prompt, effective steps in that direction, for most of the business in response to pandering advertisements is obtained within a matter of weeks. S. Rep. No. 1818, *supra*, at 2. The need for effective action to vindicate an important community interest in use of the mails was a factor essentially missing from *Lamont*, where the apparent congressional rationale was to protect a recipient from mail he was presumed not to want.

The question of overbreadth in a mail block order was before this Court in *Donaldson* v. *Read Magazine*, *supra*, and the Court found it insufficient to invalidate the statute on its face. There, a broad mail block order had been entered initially, and respondents attacked it in part for the reason relied on below—that it would hinder their receipt of mail the government had no right to interfere with. Pending reargument after this Court had invited discussion of the breadth of the order, the Postmaster General modified the scope of the order to block only those letters most likely, from the form of address used, to be in response to the fraudulent scheme. The Court approved the modification, 333 U.S. at 182–185, and then rejected a sweeping constitutional attack on the statute. *Id.* at 189–192. It was evidently of the opinion, correct in our view, that any objectionable overbreadth in a mail block order would reflect an infirmity, not

in the statute, but in the order.[7] Commercial publishing houses, like Read Magazine, frequently give special, identifying address forms for use in particular transactions, such as the purchase of a magazine. Since an order can be tailored to such circumstances, the possibility that a particular order may be overbroad is insufficient to support the judgments below that Sections 4006 and 4007 are unconstitutional on their face.

CONCLUSION

Probable jurisdiction of these appeals should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

DAVID NELSON,
General Counsel,
United States Post Office.

OCTOBER 1969.

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[7] One of the important factors involved is the statutory inviolability of first class mail, 39 U.S.C. 4057, which prevents postal officials from making their own inspection of mail addressed to any individual absent special circumstances not present here.

APPENDIX A

United States District Court for the Central District of California

No. 69-64-R

TONY RIZZI, DOING BUSINESS AS THE MAIL BOX, PLAINTIFF

v.

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE UNITED STATES OF AMERICA; AND EVERETT T. CARPENTER, POSTMASTER OF THE CITY OF LOS ANGELES, STATE OF CALIFORNIA, DEFENDANTS

Memorandum Opinion and Order

Before HUFSTEDLER, Circuit Judge, and CARR and REAL, District Judges

PER CURIAM: Plaintiff brought this action for declaratory and injunctive relief against the Postmaster General of the United States and the Postmaster of the City of Los Angeles. Plaintiff alleges that 39 U.S.C. § 4006,[1] on its face, and as construed and

[1] 39 U.S.C. § 4006 provides:

"Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances of money or property of any kind through the mail for an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or causing to be deposited in the United States mail information as to where, how, or

367-271—69——2

applied to plaintiff, violates rights guaranteed to the plaintiff by the First, Fifth, Sixth, and Seventh Amendments of the United States Constitution. A three-judge District Court was convened pursuant to 28 U.S.C. § 2284 to hear plaintiff's application for an injunction to restrain enforcement of the statute.

The statute authorizes the Postmaster General, after an administrative hearing, to decide whether mailed matter is obscene and further authorizes the Postmaster General to impose a mail block against the sender of such matter following the Postmaster General's determination that the matter is obscene. The burden of seeking judicial review of the Postmaster General's decision is placed on the person against whom the mail block has been imposed.

The statute is unconstitutional on its face, because it fails to meet the requirements of *Freedman* v. *Maryland* (1965), 380 U.S. 51. (*Cf. Lamont* v. *Postmaster General* (1965) 381 U.S. 301.) We have no occasion to consider the remaining contentions of the parties, and we do not pass upon the nature of the materials claimed to be the subject of the administrative hearing.

Counsel for plaintiff is directed to prepare proposed findings of fact, conclusions of law, and judg-

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from whom the same may be obtained, the Postmaster General may—

"(1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or to his representative, to return the registered letters or other letters or mail to the sender marked 'unlawful'; and

"(2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes."

ment, pursuant to Local Rule 7 of this court and the Federal Rules of Civil Procedure.

SHIRLEY M. HUFSTEDLER,
United States Circuit Judge.

CHARLES H. CARR,
United States District Judge.

MANUEL L. REAL,
United States District Judge.

United States District Court for the Central District of California

No. 69–64–R

TONY RIZZI, DOING BUSINESS AS THE MAIL BOX, PLAINTIFF

v.

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Findings of Fact and Conclusions of Law

THE ABOVE ENTITLED CAUSE came on regularly for hearing on plaintiff's motion for injunctive relief against the Postmaster General of the United States and the Postmaster of the City of North Hollywood, before the Honorable Shirley M. Hufstedler, Circuit Judge; and Honorables Charles H. Carr and Manuel L. Real, District Judges. Stanley Fleishman appeared for plaintiff, and Wm. Matthew Byrne, Jr., United States Attorney, by Larry Dier, Assistant United States Attorney, appeared for defendants.

The Court having heard oral argument, and having examined the file herein, and being fully advised, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

Plaintiff Tony Rizzi, doing business as The Mail Box, is engaged in distributing by mail various publications.

II

Defendant Winton M. Blount is the Postmaster General of the United States of America, and defendant Everett T. Carpenter is the Postmaster of the City of North Hollywood, State of California. Defendant Carpenter, in his capacity as Postmaster, is charged with the duties of administering and managing the United States Post Office in and for the said City of North Hollywood, State of California, and is in charge and responsible for the receipt and distribution of materials sent through the United States mails for delivery in and from said City.

III

On or about December 31, 1968, Peter R. Rosenblatt, Judicial Officer of the Post Office Department, executed Order No. 68–103 addressed to defendant Carpenter herein, instructing said defendant Carpenter to return to the sender all mail addressed to plaintiff (with minor exceptions) with the word "Unlawful" stamped upon the outside of such mail.

IV

The said Order was made purportedly pursuant to 39 U.S.C. § 4006. Said Section authorizes the Postmaster General, after an administrative hearing, to decide whether mail matter is obscene, and further

authorizes the Postmaster General to impose a mail block against the sender of such matter following the Postmaster General's determination that the matter is obscene. The burden of seeking judicial review of the Postmaster General's decision is placed on the person against whom the mail block has been imposed.

V

39 U.S.C. § 4006 fails to meet the essential requirements necessary to restrain speech, set forth by the United States Supreme Court in *Freedman* v. *Maryland* (1965), 380 U.S. 51.

VI

It is not necessary to consider the remaining contentions of the parties, and we do not pass upon the nature of the materials which were the subject of the administrative hearing.

CONCLUSIONS OF LAW

I

This is a proper case for the convening of a three-judge District Court in accordance with 28 U.S.C. § 2284 to hear plaintiff's application for an injunction to restrain enforcement of 39 U.S.C. § 4006 on the ground that the said statute, on its face and as construed and applied to plaintiff, violates rights guaranteed to the plaintiff by the First, Fifth and Sixth amendments to the United States Constitution.

II

Defendants have imposed a mail block against plaintiff's mail pursuant to 39 U.S.C. § 4006.

III

39 U.S.C. § 4006 is unconstitutional on its face, because it fails to meet the requirements of *Freedman* v. *Maryland* (1965), 380 U.S. 51, wherein the United States Supreme Court imposed strict limitations on interference with freedoms of speech and press. 39 U.S.C. § 4006 also conflicts with *Lamont* v. *Postmaster General* (1965), 381 U.S. 301, because it imposes an unconstitutional burden on the exercise of First Amendment rights.

IV

Plaintiff is entitled to a judgment:

(a) directing the defendants to vacate the Order of the Judicial Officer of the Post Office Department (No. 68–103), executed on or about December 31, 1968; and

(b) directing the defendants to deliver forthwith to plaintiff all mail addressed to plaintiff now in defendants' possession and to forward all mail addressed to plaintiff, without interference.

V

Plaintiff is entitled to a judgment restraining the defendants, and each of them, their agents, servants, employees and attorneys, and all persons in active concert or participating with them, from instituting against plaintiff any proceedings under 39 U.S.C.

§ 4006, and from enforcing or attempting to enforce the provisions of 39 U.S.C. § 4006 against plaintiff.

DATED: This 1st day of August, 1969.

SHIRLEY M. HUFSTEDLER,
United States Circuit Judge.
CHARLES H. CARR,
United States District Judge.
MANUEL L. REAL,
United States District Judge.

Approved as to form:

STANLEY FLEISHMAN,
Attorney for Plaintiff.
WM. MATTHEW BYRNE, JR.,
United States Attorney,
By: LARRY L. DIER,
Assistant United States Attorney,
Attorneys for Defendants.

United States District Court for the
Central District of California

No. 69–64–R

TONY RIZZI, DOING BUSINESS AS THE MAIL BOX,
PLAINTIFF

v.

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Judgment

THE COURT, having made its Findings of Fact and Conclusions of Law in the above entitled matter,

IT IS ORDERED, ADJUDGED AND DECREED, that defendants WINTON M. BLOUNT, Postmaster General of the

United States of America; and EVERETT T. CARPENTER, Postmaster of the City of North Hollywood, State of California, and their agents, servants, employees and attorneys, and all persons in active concert or participating with them:

1. Vacate the Order of the Judicial Officer of the Post Office Department (No. 68–103) executed on or about December 31, 1968; and

2. Deliver forthwith to plaintiff all mail addressed to plaintiff now in defendants' possession and to forward all mail addressed to plaintiff, without interference; and

3. Refrain from any proceedings, acts or conduct enforcing the provisions of 39 U.S.C. § 4006 against plaintiff.

DATED: This 1st day of August, 1969.

SHIRLEY M. HUFSTEDLER,
United States Circuit Judge.

CHARLES H. CARR
United States District Judge.

MANUEL L. REAL
United States District Judge.

Approved as to form:

STANLEY FLEISHMAN,
Attorney for Plaintiff.

WM. MATTHEW BYRNE, JR.,
United States Attorney,

By: LARRY DIER,
Assistant United States Attorney,
Attorneys for Defendants.

Post Office Department, Washington, D.C.

P.O.D. Docket No. 3/9

IN THE MATTER OF THE COMPLAINT AGAINST THE MAIL BOX AT P.O. BOX 3192, NORTH HOLLYWOOD, CALIFORNIA

Departmental Decision

APPEARANCES:

For the Complainant:
Thomas H. May, Esq.
Jerry P. McKinnon, Esq.
Office of the General Counsel
Post Office Department
Washington, D.C.

For the Respondent:
Stanley Fleishman, Esq.
Peter Marx, Esq.
Robert C. McDaniel, Esq.
1680 Vine Street
Hollywood, California

INTRODUCTION

By complaint filed November 1, 1968, the General Counsel of the Post Office Department (the Complainant) alleged that The Mail Box (the Respondent) is conducting through the mails an enterprise in violation of 39 U.S.C. § 4006. The Complainant concurrently moved for an expedited hearing to be presided over by the Judicial Officer. On November 4, 1968 the Judicial Officer granted the motion for the expedited hearing.

The Respondent's answer, filed November 18, 1968, denied the allegations of the complaint. The Respondent concurrently moved to dismiss the complaint upon the grounds that it failed to state a violation of

§ 4006, that it violates the Respondent's rights under the First and Fifth Amendments to the United States Constitution, and that the seven magazines against which the complaint was brought (hereinafter the "Magazines") are legally indistinguishable from others heretofore found to be protected. The Respondent also requested that the Judicial Officer take judicial [sic] notice of certain of those previous decisions. By reply filed November 22, 1968 the Complainant argued against the Respondent's motion and cross-moved to strike portions of the Respondent's pleadings. On November 26, 1968 the Judicial Officer denied both the Respondent's motion and the Complainant's cross motion, and ruled that Postal Manual § 821.331 (b) deprives him of the authority "to determine the constitutionality of statutes".

The hearing herein was held in Los Angeles, California, on December 3–5, 1968. At the conclusion thereof the Judicial Officer announced that decision would be reserved pending submission of proposed findings of fact and memoranda of law by the parties. Such papers were to be filed within five days of the delivery of a copy of the transcript of the hearing to counsel for the Complainant.

Counsel for the Respondent moved that a copy of the transcript be supplied to the Respondent free of charge. The Judicial Officer denied the motion, without prejudice to later renewal, upon the ground that counsel had failed to make any showing in support thereof. Counsel then asked that he be permitted to submit his memorandum without page citations of the record. The request was granted.

The final volume of the transcript was delivered to counsel for the Complainant on December 18, 1968 and the latter's proposed findings of fact, proposed conclusions of law and memorandum of law were filed

on December 23, 1968. A similar document on behalf of the Respondent was filed on December 28, 1968.

THE COMPLAINT

The complaint charges as follows:

"The undersigned, Assistant General Counsel, Mailability Division, Post Office Department, has probable cause to believe, and therefore alleges, that under the name set forth in the caption hereof (hereinafter called the Respondent) there is being conducted through the mails an enterprise in violation of Section 4006, Title 39 U.S. Code, and in support of that belief alleges as follows:

"(1) That the Respondent is now and for some time heretofore has been obtaining and attempting to obtain remittances of money through the mails for obscene, lewd, lascivious, indecent, filthy or vile articles namely certain magazines;

"(2) That the Respondent is depositing or causing to be deposited in the United States mails circular matter giving information as to where, how, or from whom articles and things of an obscene, lewd, lascivious, indecent, filthy or vile nature may be obtained;

"(3) That attached hereto as Exhibits A through G are true copies of the said circular matter mentioned in the item next above;

"(4) That to persons remitting to Respondent, the sums of money stated in the aforesaid advertisements and solicitations, Respondent sends articles, among them the following magazines which are of an obscene, lewd, lascivious, indecent, filthy or vile nature;

"'ME'

"'GIGI'

"'SUSY'

"'MATCH'

"'BUNNY'
"'GOLDEN GIRLS'
"'GIRL FRIEND'

"(5) That Respondent is using the mails for the conduct of an enterprise whereby it conveys obscene, lewd, lascivious, indecent, filthy, or vile articles to all those who make appropriate remittances of money therefor.

"WHEREFORE, pursuant to the provisions of Title 39, U.S. Code, Section 4006, it is requested that an appropriate order issue to the appropriate postmasters to dispose of all mail addressed for delivery to, and money orders drawn in favor of, THE MAIL BOX, or agents or representatives as such, in accordance with the provisions of said Title 39, U.S. Code, Section 4006."

THE EVIDENCE

Six witnesses appeared on behalf of the Complainant. The thrust of their testimony was as follows:

Donald Schoof, a postal inspector, established jurisdiction and testified with respect to the conduct of the investigation of this case.

Marshall La Cour, head of the photography department at Cypress Junior College, Cypress, California was established as an expert in photography and testified that the photographs in the Magazines displayed poor photographic composition and technique and that they were inartful and entirely without aesthetic quality.

Dr. Melvin Anchel, a psychiatrist, testified that the Magazines lacked any kind of psychological or other value for normal persons of any age, can arrest the normal development of children, can cause "cliff-hanging" adults to regress to an earlier stage of sexual development and "are making neurotics." He described

them as unwholesome and dangerous even to psychologically healthy adults who are more than casually and infrequently exposed to them because of the Magazines' obsessive preoccupation with a distorted view of sex. He found them a "cancer" on society.

E. Richard Barnes, a California State Assemblyman, testified that some of his constituents complained to him about materials which they regarded as obscene, but which he thought were considerably less explicit than the Magazines.

Arthur J. Kates, the head of a large periodical distributing company covering all types of neighborhoods in Los Angeles, stated that his company would not agree to distribute the Magazines and that if it did its business would be destroyed.

Charles Crecelius, a salesman, former elementary school principal and vice chairman of the Los Angeles County Commission on Obscenity and Pornography, was established as a person who has expertise concerning the contemporary community standards in the Los Angeles area and in the United States relative to sexual matters. Mr. Crecelius testified that the Magazines affront contemporary community standards in Los Angeles and the United States relating to the description or representation of sexual matters.

The only witness testifying for the Respondent was *Robert C. McDaniel,* Esq., a practicing lawyer who appeared for the Respondent herein and serves as an associate of Stanley Fleishman, Esq., the Respondent's attorney. Mr. McDaniel was qualified as an expert in constitutional law with particular reference to obscenity. He opined that the Magazines were protected by previous court decisions which had held other magazines which he found comparable to be not obscene.

DISCUSSION

Six of the seven Magazines are composed of exactly 32 printed pages roughly 8½ by 11 inches in size, stapled together in typical magazine form. The 24 pages of the seventh magazine, *Me,* measure about 5½ by 8½ inches. Each of the Magazines is composed largely of photographs of nude or semi-nude women. Such scant written material and advertising as appears in the Magazines relates exclusively to subjects bearing upon physical sex and nudity.

The seven Magazines can be divided into three categories, insofar as their content and format are concerned:

1. *Girl Friend, Golden Girls, Bunny* and *Match* follow an identical format. The 32 pages (including covers) of each magazine are precisely divided into:

—23 pages of photographs in each of which one nude woman is shown, usually with thighs spread so as to display her genitals. None of the photographs is captioned or specifically linked in subject with the magazines' written material.

—3¼ pages are devoted to a table of contents and advertisements displaying the covers of other publications of a similar nature, touting a "nudist film," Danish "studies in the nude art" and a certain "Studio 'A' " in New York City where one is invited to "photograph female figure models" or skin paint—"try your own designs directly on our female FIGURE MODELS."

—5¾ pages are divided among four articles which are either unsigned or attributed to such presumably pseudonymous authors as "Stanley Sorrel," "Stan Morrel," and "Stanley Ho-

ward," or "Hal Lyons" and "Hal Saint." The articles are given titles such as "Invitation to Rape," "Paradise for Swingers," "Is Wife-swapping for Real?" and "The Nude Imperiled."

The only variation to this rigid formula is found in *Golden Girls,* which substitutes an additional half-page of articles for a half-page of advertising. Each of these four of the Magazines lists one Bradford I. Boone as its editor. An identical statement below the table of contents in *Girl Friend* and *Bunny* describes each magazine as:

> a publication seeking to communicate contemporary views relating to sex to prevailing mores. We observe and report on life as it is.

The parallel statement in *Golden Girls* and *Match* proclaims each of those publications as:

> a journal equating the nude to contemporary mores. Its goals will be achieved by way of free communication and exemplary photo-artistry establishing the wholesomeness, beauty and charm of the unadorned figure.

2. *Gigi* and *Susy* allot their 32 pages in slightly different proportion.

> —28 pages of *Susy* and 28¾ pages of *Gigi* are given over to captionless photographs of lasciviously posed nude girls. In *Susy* only a total of 5 pages of photographs depict more than one girl per study, but in *Gigi* more than half of the pictures show two or three naked women embracing or otherwise disporting themselves, with the major photographic focus upon their genitals.
>
> —2 pages go to advertisements beckoning the reader to buy more pictures of some of the girls purportedly shown in the two magazines, an "unretouched female indoor nudist film" and

still photo-sets, and two magazines, one of which is called *Lesbianism—A Sexual Study* ("100 intimate fotos [sic] of lesbians—20 case histories") and the other *Sadism and Masochism* ("60 intimate fotos—20 models" and a thorough study on "spanking and the Lesbian" and "homosexual spanking").

—*Susy* devotes its remaining 2 pages to an unsigned story entitled "The Conversion" which purports to detail, in the first-person, the seduction into lesbianism of a girl increasingly dissatisfied with her intensely active heterosexual life. *Gigi* spares about 1¼ pages to a fictional story about a girl's successful utilization of her body on the road to movie stardom.

Neither magazine contains a printed word other than in its single story, the two pages of advertising and the front cover.

3. The only printed words appearing in *Me,* the seventh magazine, are on its cover. The rest of the publication is given over entirely to the familiar gallery of uncaptioned photographs of one or several naked women in the usual noisome poses.

The women depicted in each of the Magazines' photographs are almost always positioned in such a fashion as to display their genitals prominently and in clinical detail. The models are typically portrayed with thighs widely parted or in some other forced and unnatural position which serves to spread or otherwise feature their organ and focus attention upon it. When they are shown partially clothed the clothes are so arranged as to further stress the photographic focus on the sexual organ.

Printed in ⅛ to ¼ inch type at the bottom of the front cover of each of the Magazines there appear the words "Adults Only" or, in the cases of *Susy and Gigi,* "For Adults Only." The order blanks attached to the

Respondent's circulars bear a statement that the remitter must be at least 21 years old. However these outward manifestations of Respondent's concern are not part of a serious effort to deter indiscriminate circulation of the Magazines to minors. On the contrary, they serve both as additional enticement and as a sort of verbal screen behind which the Respondent conducts its business in a fashion which negatives such concern and which, in fact, almost precludes further efforts to ascertain a remitter's age.

Donald Schoof, the postal inspector, in establishing jurisdiction, testified to the complaint of postal patrons against mail receipt of the Respondent's pandering solicitations and his own use of the mails in sending for the Magaines (34 ff.).* Mr. Schoof's testimony revealed that he simply sent the Respondent one of the latter's own printed order forms and the required money and was sent the Magazines in return. He could quite easily have been well under 21 years of age for all the Respondent knew or, one may suppose, cared.

In *Roth* v. *United States* (1956) 354 U.S. 476 and in several decisions that followed the United States Supreme Court defined obscenity in these terms [*Memoirs* v. *Massachusetts* (1965) 383 U.S. 413, at p. 418]:

> * * * three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

*References, unless otherwise noted, are to pages of the typed transcript of the hearing.

The evidence adduced by the Complainant established that the dominant theme of the material taken as a whole appeals to the prurient interest [*Roth* v. *United States, supra,* at p. 489; *Memoirs* v. *Massachusetts, supra,* at pp. 418–19; *Jacobellis* v. *Ohio* (1963) 378 U.S. 184, 191; *Manual Enterprises* v. *Day* (1961) 370 U.S. 478, 486–8].

The witness Dr. Anchell did not know the meaning of the word "prurient" (134–5, 223), but he did describe the Magazines in terms which are used by the Webster Dictionary to define "prurient"—namely, "1. having lustful ideas or desires. 2. lustful; lascivious; lewd: * * *." Thus, the doctor found the Magazines, among other things, "lewd," "lascivious" and "filth" and stated that their effect would be to stimulate the reader sexually and push him in the direction of perverted forms of sexual expression—"It conjures up earlier developmental stages, times which the visual gave this individual or the exhibitionist, voyeuristic pleasures gave this individual more satisfaction than the normal mature sexuality, and so he is brought back very strongly with such stimuli." (151, 136–152, 161–6, 181–2, 223–5, 248–9.)

Mr. La Cour, the photographer, testified that in almost every one of the photographs in the Magazines the pubic area of the model shown has been "foreshortened"—that is, a photographic technique has been used to bring the model's pubic area too close to the camera for correct perception in order to "force" the observers' attention upon it (100–1).

Any lingering doubt about the Respondent's intent to appeal to the prurient interest and its success in so doing is dissipated by an examination of the circulars [Exhibits A, B, F2(1), N–1(b)] by which the Respondent advertised the Magazines and solicited orders for them [see *Ginzburg* v. *United States* (1965)

383 U.S. 463, 470–4 and *United States* v. *Rebhuhn* (C.A. 2, 1940) 109 F.(2d) 512, 515, concerning role of advertising]. Each of the Magazines was advertised in flyers which appeal to the full range of human sexual deviations and perversions. Thus we find an issue of *Me* advertised under the heading "Female Nudist Specials" among photos of the covers of 24 other such publications each of which shows a nude or semi-nude girl in a pose typical of those in the Magazines themselves. The same circular advertises, in the same manner, 25 "Spanking, Bondage & Flag Mags.," "20 New Paperbacks * * * bound in full color covers * * * banned from the U.S.A. until recently," and 18 "Sexual Study Books" including *Sadism and Masochism, Female Masturbation, New Breast Fetishism* and *A Study of the Peeping Tom * * * Plus 60 Revealing Photos of Women Caught Unaware of the Fact that they were being Photographed NUDE.*

Suffice it to say that the other advertising adduced at the hearing, by which the Respondent solicited orders, is characterized by the same unrelieved, leering sordidness. For accuracy, none of the advertising can surpass Exhibit F2(1) which, in touting *Girl Friend, Bunny, Golden Girls* and *Match,* promises:

> Unusual photographic techniques, exploring every nook and cranny of the female form. Additional emphasis is placed on the *inner* beauty of our models, as the camera explores bodily regions never attempted before. Close attention to detail * * *.

If the dominant theme of the material taken as a whole—largely photographs of nude or semi-nude women with legs akimbo and uncovered pubes presented to the camera—cannot be taken as an appeal to the prurient interest then, indeed, the word "pru-

rient" and those other words by which it is defined have ceased to have any meaning.

The second of the elements of obscenity requires an inquiry as to whether the Magazines are patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters [*Roth* v. *United States, supra,* at p. 489; *Memoirs* v. *Massachusetts, supra,* at pp. 418–19; *Jacobellis* v. *Ohio, supra,* at pp. 191–5; *Manual Enterprises* v. *Day, supra,* at pp. 486–7].

Exhaustive examination on the point established the witness Crecelius' unusual interest and activity in the area of pornography and obscenity. It was clear that he approached the problem from his own personal standpoint and lacked a sophisticated background in the subject. However it became equally evident that his sustained interest, voluntary work and official position in his home community of Los Angeles, and wide and continuous travel and inquiry on the subject within the United States, qualified him to deliver an opinion regarding contemporary standards in Los Angeles and the United States relating to the description or representation of sexual matters. In his opinion the Magazines fell below such standards.

Mr. Barnes, the assemblyman, testified that Californians "repeatedly" (273) complained to him about materials considerably less explicit than the Magazines.

Mr. Kates, the owner and chief executive officer of Sunset News Company, a large periodical distributor in the Los Angeles metropolitan area, testified that Sunset distributes, *inter alia,* magazines such as *Playboy, True* and *Cavalier,* which depict women in the nude or semi-nude. However he said, "I can make the

unqualified statement if the Sunset News Company distributed any one of the periodicals that I have examined [the Magazines] to our dealers, they would not only not be accepted, but it would result in the destruction of Sunset News Company" (290–1). He further declared that "The distribution of these periodicals in my opinion through any legitimate trade channels would result in the destruction of those channels. They are not acceptable at any price" (298).

I find that the Magazines considerably exceed the customary limits of candor in the United States and affront contemporary community standards relating to the description or representation of sexual matters. They are therefore patently offensive.

Even though the Magazines' patent offensiveness and their appeal to the prurient interest have been ascertained they cannot be found obscene unless it can also be determined that the material they contain is without "the slightest redeeming social importance" [*Roth* v. *United States, supra,* at p. 484; *Memoirs* v. *Massachusetts, supra,* at pp. 418–19; *Jacobellis* v. *Ohio, supra,* at p. 191].

Dr. Anchell's persuasive and uncontroverted testimony established that, far from having any beneficial effect upon readers young and adult, emotionally stable and unstable, perverted and "normal," this material could only have a distinctly damaging impact if it had any at all. The best that could be hoped for was that it would have none.

From the witness La Cour we learned that the pictures, which occupy anywhere from a minimum of about eighty percent to a maximum of one-hundred percent of the Magazines' space, are bad photography and lacking in artistic or aesthetic quality.

Me, of course, lacks written material, and only 1¼ pages in *Gigi,* 2 pages in *Susy,* 5¾ pages in *Girl Friend, Bunny* and *Match,* and 6¼ pages in *Golden Girls* are given over to some kind of writing. Each of them, with the exception of the fiction in *Gigi* and *Susy,* is devoted to some ostensibly serious topic or the subject of sex or nudity. None of them makes any attempt to contribute to the sum of human knowledge seriously promote a social cause, provide useful information, or even entertain, except perhaps by catering to the presumed needs of particularly obsessive readers. The same can be said of *Gigi*'s and *Susy*'s fiction.

The pro-forma assertions of serious intent hoisted like a talisman near the mastheads of *Girl Friend, Golden Girls, Bunny* and *Match* and quoted on page 8 hereof, proclaim a serious and socially redeeming value which those and the other Magazines fail to deliver. Needless to say the Respondent's advertising heralds the very reverse of the serious social purposes which the Magazines proclaim they serve. The mere recitation of a formula or the insertion of a few stock paragraphs or pages of written filler material will not serve to lend redeeming social importance to a publication which would otherwise lack it.

I find the Magazines lacking "even the slightest redeeming social importance."

The Respondent's case was based entirely upon the contention that various courts of law and the Post Office Department itself had passed upon other publications represented as being of a similar nature and had found them to be not obscene. In other words, the Respondent offered no evidence in rebuttal of the Complainant's case but, rather, argued the law.

The precedents presented and the samples of the materials on which they turned are as follows (in the order offered):

United States v. *Three Packages*, Civil No. 68–25–F, U.S.D.C., Cent. Dist. Cal. (Ferguson, J.), findings of fact and conclusions of law, Feb. 20, 1968 (Exhibits R-1).	Exhibits 3–9.
United States V. 80 Cartons, Civil No. 68–480–IH, U.S.D.C., Cent. Dist. Cal. (Hill, J.), findings of fact and conclusions of law, April 30, 1968 (Exhibit R–2).	Exhibits 6–10.
Magazines which enjoy second-class mailing privileges granted by the Post Office Department.	Exhibits 13–20.
People v. *Bonanza Printing Co., Inc., et al.*, No. 317074 Los Angeles Municipal Court (Ackerman, J.), Nov. 8, 1968.	Exhibits 21–22.
Felton v. *Pensacola* (1968) 390 U.S. 340	Exhibits 23–27.
United States v. *Six Parcels of Photographs*, Civil No. 66-1129-PH, U.S.D.C., Cent. Dist. Cal. (Hall, J.), order granting motion for Summary Judgment and Judgment, Dec. 3, 1968 (Exhibit R–28).	Exhibits 28 a–e.

In rebuttal, the Complainant offered the decision, findings of fact, conclusions of law and order of dismissal of the U.S. District Court for the Central District of California (Hauk, J.) in *Marvin Miller,* et al. v. *Thomas Reddin,* et al., No. 68–712–AAH, of November 18, 1968 (Exhibit O) and *Female Photographs* (Exhibit O–1), one of the publications passed on in that case. Subsequent to the hearing herein another judge of the same court (Real, J.) found the same publication not obscene in a criminal trial of that issue (*United States* v. *Marvin Miller,* Nos. 1842, 2166, 2396).

I find that none of these decisions provide me with a binding precedent. In *Felton* v. *Pensacola, supra,* the Supreme Court, citing *Redrup* v. *New York* (1967) 386 U.S. 767, held distribution of the materials at issue to be protected by the First and Fourteenth Amendments. It is obvious at a glance that the materials which the Court there ruled on differ from the Magazines here at issue in several particulars touching upon each of the three elements by which the Supreme Court defined obscenity in *Roth* and the decisions that followed.

Without getting into matters of comparison, I find that the value of the three California district court decisions offered by the Respondent as precedents in defining the perameters of permissable expression, is nullified by the same court's contrary holding on the book *Female Photographs* (Exhibit O–1) in *Miller* v. *Reddin, supra,* which, in turn, is further confused by the holding in *United States* v. *Marvin Miller, supra.* Nor will I accept a decision of the Los Angeles Municipal Court as a binding interpretation of obscenity under the federal statute. Likewise, the mere granting of second-class entry to certain publications establishes no formal or informal precedent which is binding upon the Judicial Officer in rendering a departmental decision. The regulations of the Department provide that such action is actually subject to the Judicial Officer's review on appeal by a rejected applicant. It might also be noted that on only one occasion since the Supreme Court raised a fundamental question as to the Department's administrative jurisdiction in 1961 in *Manual Enterprises* v. *Day, supra,* has the Department sought to deny second-class entry to a publication on grounds of obscenity.

For some years now the basic questions relating to obscenity have given rise to an intense public debate: Is the concept of obscenity worthy of retention; do concededly obscene materials indeed have an unwholesome or unhealthy effect upon society or any of its individual members; and do any public agencies therefore have the right to inhibit the free circulation of concededly obscene materials on that ground? The ultimate answers to these questions must await, among other things, greater empirical knowledge of the impact of erotica on society. But for the present the appropriate authorities in our society, the Congress and the United States Supreme Court, have answered

all three questions in the affirmative. The Congress has also long imposed upon this Department the right and duty of exercising a certain limited scrutiny over materials distributed through the mails, and the Supreme Court has not specifically relieved us of that function.

Since the concept of obscenity as an offense to society's standards and best interests yet remains in our system of law, it would be logically inconsistent to deprive it of any meaningful content. No fair-minded observer could possibly conclude that these Magazines with their page upon endless page of pictures of naked women with spread thighs, are designed for any purpose other than as an appeal to the prurient interest; and one would have to be prepared to conclude that the prurient appeal is of itself socially important in order to discern the element of redeeming social value in the Magazines. While that portion of the Complainant's presentation specifically directed to the issue of offense to contemporary community standards was not particularly impressive, the evidence as a whole amply established the fact that Americans as a whole are not yet prepared to grant such grossly commercial, artistically worthless, socially unexpressive and otherwise valueless erotica an accepted place in the panoply of diverse utterances which flourish in a free society.

Hence until such time as the concept of obscenity has been abandoned for good and all or so drastically restricted as to apply, for example, only to depictions of sex acts—as the California Supreme Court is recently reported to have suggested—or until this Department is conclusively stripped of its legal duties in regard to obscenity, there can be no doubt that prevailing legal and cultural norms require the findings and conclusions contained herein.

In accordance with the foregoing decision I now make my formal Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

1. The Respondent has deposited in the mails advertisements or circular matter giving information as to where, how or from whom the magazines *Me* No. 4; *Gigi* Vol. 1, No. 3; *Susy* Vol. 1, No. 1; *Match* No. 1; *Bunny* No. 1; *Golden Girls* No. 1 and *Girl Friend* No. 1 could be obtained.

2. The Respondent sent the aforesaid magazines to persons remitting to the Respondent the sums of money stated in the aforesaid advertisements or circular matter.

3. The dominant theme and predominant appeal of each of the aforesaid magazines, taken as a whole, is to the prurient interest in sex. They are patently offensive to contemporary community standards relating to the description or representation of sexual matters and are utterly without redeeming social importance.

4. The following Conclusions of Law, insofar as they may be deemed Findings of Fact, are so found to be true in all respects. From the foregoing facts I conclude:

CONCLUSIONS OF LAW

1. The magazines *Me* No. 4; *Gigi* Vol. 1, No. 3; *Susy* Vol. 1, No. 1; *Match* No. 1; *Bunny* No. 1; *Golden Girls* No. 1 and *Girl Friend* No. 1 are obscene, and therefore do not constitute constitutionally protected expression.

2. "The Mail Box" is a person who is obtaining or attempting to obtain remittances of money through the mail for the seven aforesaid magazines which are

obscene, lewd, lascivious, indecent, filthy or vile within the meaning of 39 U.S.C. § 4006.

3. "The Mail Box" is a person who is depositing, or causing to be deposited, in the United States Mail information as to where, how and from whom the addressee may obtain magazines which are obscene, lewd, lascivious, indecent, filthy or vile within the meaning of 39 U.S.C. § 4006.

4. The activities set forth in conclusions 2 and 3 constitute a violation of the provisions of 39 U.S.C. § 4006 governing the use of the United States Mails for the advertising of, or receipt of remittances for unlawful matter.

5. Any Conclusions of Law contained in the Findings of Fact are incorporated herein by reference.

CONCLUSION

For all of the foregoing reasons I find that the Respondent's activities complained of constitute an enterprise in violation of 39 U.S.C. § 4006. An order to the appropriate postmasters pursuant to the provisions of 39 U.S.C. § 4006 will, accordingly, issue forthwith.

PETER R. ROSENBLATT,
Judicial Officer.

MEMORANDUM—U.S. POST OFFICE DEPARTMENT
DECEMBER 31, 1968.

Subject: Transmittal of unlawful order.
From: Judicial Officer, Post Office Department, Washington, D.C. 20260.
To: Postmaster, North Hollywood, California.
In reply refer to: P.O.D. Docket 3/9.

I enclose herewith a copy of Order No. 68-103, dated December 31, 1968, forbidding the delivery of mail and the payment of money orders to:

THE MAIL BOX, P.O. Box 3192
at
North Hollywood, California 91609

This order does *not* cover (1) mail under frank or (2) mail covered by a penalty envelope or (3) mail which appears to be unconnected with the activity covered by the order. Mail in the third category frequently includes, but is not necessarily limited to letters from public utilities, Federal, State and Municipal agencies, or lawyers and magazines or newspapers. Mail in any of these three categories should be delivered to the addressee.

All mail which does not clearly appear to be in one of the three above categories shall be held for the addressee for no less than 24 hours after its receipt. The addressee or his representative, but no other person, shall have the right to open and inspect such mail at a reasonable hour during the said 24 hour period, in the presence of the postmaster or some postal employee designated by him. If an inspection cannot be held within 24 hours because of intervening holidays or other unforeseen circumstances, another 24 hours, or more, if necessary, should be allowed for inspection.

After such joint inspection so much of the inspected mail as has been shown to be unconnected with the enterprise covered by the enclosed order shall be turned over to the addressee or his representative.

Any mail containing cash, checks or money orders apparently in payment for merchandise connected with the enterprise covered by the enclosed order and any other mail connected therewith, except for mail

containing demands for refunds, shall be withheld and immediately returned to the postmaster at the point of mailing, for delivery to the sender. However, all mail containing demands for refunds shall be turned over to the addressee or his representative even though connected with the enterprise covered by the enclosed order.

Please acknowledge receipt of this memorandum and of the enclosed order. Any question concerning the enforcement of the order should be directed to me at the above address.

PETER R. ROSENBLATT,
Judicial Officer.

POST OFFICE DEPARTMENT,
Washington, December 31, 1968.

Order No. 68–103.

To the Postmaster at North Hollywood, California 91603.

Satisfactory evidence having been presented to the Post Office Department that the United States mails are being used by:

THE MAIL BOX, P.O. Box 3192
at
North Hollywood, California 91609

and their agents and representatives (hereinafter the "Respondent") in violation of Section 4006 of Title 39, United States Code, which prohibits obtaining or attempting to obtain remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, and depositing or causing to be deposited in the mails information as to where, how or from whom the same may be obtained, the said

evidence being a part of the record in the case identified below by docket number (hereinafter the "unlawful activity"),

Now, therefore, by virtue of the authority vested in the Postmaster General by the provisions of said law, and by him delegated to me (Public Law 86-676, approved July 14, 1960, and 26 F.R. 10813, November 18, 1961), I hereby forbid you to pay any postal money order drawn to the order of the said Respondent. I further direct you to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon presentation of said order at the issuing office or, in the event the original order is not available, that repayment may be effected by means of a duplicate order obtained under regulations of the Department.

You are further directed to hold all mail, whether registered or not, which shall arrive at your office directed to the said Respondent except for so much thereof as can be identified on the face of the wrapper as not relating to the unlawful activity. All mail not so identified shall be held for 24 hours after its receipt, during which time the Respondent shall have the right to examine the mail so held at a reasonable time, in your presence or the presence of a postal employee designated by you, and receive such mail as is not connected with the unlawful activity, including mail requesting a refund or return of merchandise.

You are further directed to write plainly or stamp the word "Unlawful" upon the outside of all the mail connected with the unlawful activity and return it to the postmasters at the offices where it was mailed, to be returned to the senders. Where there is nothing to identify the senders of such mail it shall be sent to

the appropriate dead letter branch with the word "Unlawful" plainly written or stamped thereon, to be disposed of as dead matter under the laws and regulations applicable thereto.

P.O.D. Docket No. 3/9, G.C. 4370.

PETER R. ROSENBLATT,
Judicial Officer.

APPENDIX B

United States District Court for the Northern District of Georgia—Atlanta Division

Civil Action No. 12812

UNITED STATES OF AMERICA AND THE POSTMASTER GENERAL

v.

THE BOOK BIN

Before MORGAN, Circuit Judge, and EDENFIELD and HOOPER, District Judges

EDENFIELD, *District Judge:* The issue before this three-judge court is the constitutionality of 39 U.S.C. §§ 4006, 4007, under which the Postmaster General acts to curb the flow of allegedly obscene materials through the mails.

On or about June 10, 1969, a complaint was served on the defendant by a representative of the Postmaster General under 39 U.S.C. § 4006, charging that the magazine "Models of France," distributed by defendant, was obscene. An order granting an expedited proceeding was attached, setting a hearing for July 8, 1969, which has since been postponed indefinitely. On June 13, 1969, the United States notified defendant that a temporary restraining order and preliminary injunction would be sought under 39 U.S.C. § 4007, in the United States District Court for the Northern District of Georgia. Under § 4007, a court, upon a showing of probable cause that the

obscenity statute has been violated, may direct the detention of all of a defendant's incoming mail, pending the conclusion of the § 4006 proceedings and any appeal therefrom. By way of answer and counterclaim, defendant has challenged the statutory scheme employed under §§ 4006, 4007. A three-judge court was convened to consider this constitutional challenge. At oral hearing, the Government recognized the desirability of an immediate determination of the constitutional questions.

Under § 4006:

> Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances or money or property of any kind through the mail for an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or causing to be deposited in the United States mail information as to where, how, or from whom the same may be obtained, the Postmaster General may—
>
> (1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or to his representatives, to return the registered letters or other letters or mail to the sender marked "Unlawful"; and
>
> (2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes.

Thus, upon an administrative finding by the Postmaster General that the defendant is sending obscene material through the mail, all of his incoming mail may be marked unlawful and returned to the senders, and the Postmaster General may forbid payment

of any money orders or postal notes drawn to his name and likewise return them to the senders.

However, prior to 1956, the Postmaster had no authority to prevent the delivery of mail to the suspected offender during the pendency of the statutory [§ 4006] proceedings. "As a result, the person against whom such a mail block was finally imposed had frequently reaped the harvest from his illegal activity and, mail addressed to one location having been blocked, simply launched a similar activity at a new address." Senate Report No. 1818, U.S. Code Cong. and Admin. News, 86th Cong., 2d S., 1960, at 3246.

To remedy this situation, the Postmaster General in 1956 received congressional authority to enter an order permitting the temporary, 20-day, impounding of a defendant's incoming mail pending culmination of statutory proceedings and appeal, if necessary to the enforcement of § 4006. The United States District Court could extend the period of detention upon the petition of the Postmaster General. Because of the hardship imposed by the 20-day limitation, the Post Office Department requested—and a House of Representatives bill granted—a 45-day period of detention of a defendant's incoming mail, after which an extension could be obtained by a United States District Court order. However, in 1960, the Congress adopted a Senate measure which removed the arbitrary time limit on detention pending § 4006 action, by substituting a judicial injunction permitting detention throughout the course of the statutory proceedings under § 4006. The 1960 bill, now § 4007, was designed to insure "court supervision of the exercise of the power to detain mail" coming to the defendant. *See,* U.S. Code Cong. and Admin. News, 86th Cong., 2d S., 1960, at 3246; *Manual Enterprises* v. *Day,* 370 U.S.

478, 512–519 (1962) (Brennan, J., concurring). Section 4007 provides, in pertinent part:

> (a) In preparation for or during the pendency of proceedings under sections 4005 and 4006 of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Postmaster General and upon a showing of probable cause to believe the statute is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incoming mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom. The district court may provide in the order that the detained mail be open to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity. An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings.

Section 4007 thus complements § 4006, *see,* 39 C.F.R. § 952.6, and the two sections should be interpreted together. For reasons set out below, we find this statutory scheme violative of the First Amendment to the United States Constitution.

First, under § 4007, the United States can obtain a court order detaining *all* of the incoming mail to the defendant. The breadth of this section goes far beyond merely maintaining the status quo. While the defendant may secure delivery of mail which is clearly "not connected with the alleged unlawful activity", the statute imposes an affirmative obligation upon him to examine the mail and demonstrate its non-connection. This obligation to come from under an overly broad

statutory imposition puts an unconstitutional restraint on the defendant's First Amendment rights. Thus, in *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), the Court considered a procedure under which the Postmaster General could withhold communist political propaganda sent to an addressee—as well as similar material sent in the future, if the addressee did not return a card to the post office within 20 days of its receipt. In order to receive the mail, the addressee had to request in writing on the card that it be delivered. This procedure was struck down because, as in the instant action, "[t]he addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect. * * *" *Lamont* v. *Postmaster General,* supra, at 307. Justice Brennan, in a concurrence, recognized that the consequence of inaction by the addressee was not only nondelivery of the material in question, but "a denial of access to like publications which he may desire to receive." 381 U.S. at 309. Like the procedures considered in *Lamont,* § 4007 suffers both from a fatal overbreadth of reach, in detaining all incoming mail, and from imposition of an unwarranted affirmative obligation on the defendant to remove mail unrelated to the alleged obscenity in question. It disrupts, rather than maintains, the status quo, pending post office action in § 4006.

Second, the procedures established in §§ 4006, 4007, do not pass constitutional muster under the tests established by the Supreme Court of the United States. *Freedman* v. *Maryland,* 380 U.S. 51 (1965) (per Brennan, J.), establishes the litmus tests by which we should be guided in cases such as this. There the Supreme Court recognized, as it had before, *Times Film Corp.* v. *City of Chicago,* 365 U.S. 43 (1961), that prior submission of material to agency censorship

action was not per se unconstitutional under proper safeguards. To avoid First Amendment problems, the Court required that the procedures impose the burden of proof on the censor to show obscenity, permit restraint prior to judicial review only to preserve the status quo, limit the restraint to the shortest period compatible with sound judicial administration, and assure prompt and complete judicial review. The procedures established under §§ 4006, 4007, fall short of meeting these rigid requirements.

Under these sections, no restraint is generally imposed under § 4006 until a § 4007 judicial order is obtained. However, under § 4007, the court must issue a restraining order merely upon a showing of "probable cause." This judicial determination of probable cause is not binding in any way on the administrative decision in § 4006. Section 4007 specifically provides, "An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings." Indeed, this quoted passage was inserted at the behest of the Postmaster General to "guarantee that counsel for a mailer will not be able to raise successfully a bar to all further administrative proceedings in a case in which the Government failed to prevail on its motion for a preliminary injunction." Letter, Arthur E. Summerfield, Postmaster General, to Senator Olin D. Johnston, Chairman, Senate Committee on Post Office and Civil Service, U.S. Code Cong. and Admin. News, 86th Cong., 2d S., 1960, at 3249. If a United States District Court fails to find probable cause, as it often will, the Postmaster General could still find a violation of § 4006 and impose the restrictions pursuant to that section, without any prior judicial hearing on obscenity. Moreover, it is doubtful if the limited judicial finding implicit in the grant of a § 4007 finding insulates the procedure from con-

stitutional infirmity, since the court issues its orde merely on a finding of probable cause, not an actua determination of obscenity. Thus, the statutory schem effectively operates as a prior restraint.

While prior restraints are not per se indefensible they bear a heavy presumption of invalidity. *Ban tam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963) *Carroll* v. *President and Commissioners of Princes Anne,* 393 U.S. 175 (1968). This presumptive invalid ity is not overcome in the instant case by carefull drawn safeguards. *Contrast, Kingsley Books, Inc.* v *Brown,* 354 U.S. 436 (1957). The administrative pro cedures established by regulation under § 4006, se 39 C.F.R. §§ 952.1–952.33, do not provide the pro cedural safeguards envisioned by *Freedman* and suc ceeding Supreme Court cases. Thus, in *Teitel Fil Corp.* v. *Cusack,* 390 U.S. 139 (1968), a 50- to 57-da delay between initiation of administrative procedure and institution of judicial proceedings in a censorshi action was found to be violative of First Amendmen rights. In *Freedman* itself, a delay of four months i securing initial judicial determination and six month in obtaining final appellate review was condemne 380 U.S. at 55. *Compare, United States* v. *One Carto Positive Motion Picture Film,* 247 F.Supp. 4 (S.D.N.Y. 1965), *rev'd. on other grounds,* 367 F.2 889 (2d Cir. 1966). Under the instant procedures, hearing date under § 4006 must be provided, "[w]he ever practicable * * * within 30 days of the date the notice" of the hearing. 39 C.F.R. § 952.7. In th instant case a hearing was set four weeks after ser ice of the complaint against the defendant, althoug it has since been postponed. After an administrati hearing, the Post Office hearing examiner is require only to issue a report with "all due speed." 39 C.F. § 952.24. If the hearing examiner finds against th

defendant, an appeal must be taken, to exhaust administrative remedies, within 15 days of the examiner's decision. 39 C.F.R. § 952.25. There is no deadline for the decision on administrative appeal. Moreover, 39 C.F.R. § 952.27 provides for the filing of a motion for reconsideration of a final Departmental decision.

During this protracted procedure, all of the defendant's mail may be detained if a § 4007 order has been obtained—with only a judicial decision of probable cause of obscenity. Even if the court failed to find probable cause and did not issue a § 4007 order, the defendant would be dissuaded from soliciting orders and distributing the challenged material, because of the possibility that remittances for the material would be withheld once § 4006 administrative action was complete. This chilling inhibition on First Amendment rights during the pendency of lengthy administrative procedures cannot withstand constitutional assault. An inhibition as well as a prohibition are equally denied to the Government in the First Amendment area. *Lamont* v. *Postmaster General, supra,* at 309 (Brennan, J., concurring); *see, also, Boyd* v. *United States,* 116 U.S. 616, 635 (1886).

Moreover, if the final administrative decision is against him, the defendant, under the Administrative Procedure Act, must institute judicial review and has the burden of demonstrating that no substantial evidence exists to support the Postmaster's finding of obscenity. This is too great an imposition of defendant's First Amendment rights. *See, especially, Freedman* v. *Maryland, supra,* 380 U.S. at 59–60, where such a burden was found unacceptable. *Compare United States* v. *One Carton, supra,* at 458, where the court upheld the constitutionality of § 305 of the Tariff Act, because, in part, the defendant there did not bear the burden of securing a judicial determination of obscen-

ity; rather the burden was thrust on the Government. *See, also, United States* v. *Magazine Entitled "Hellenic Sun"*, 253 F. Supp. 498 (D. Md. 1966), *aff'd.*, 373 F. 2d 633 (4th Cir. 1967). The application of the Postmaster General here for an injunction under § 4007 does not correct this constitutional flaw in the instant statutory network. As noted, § 4007 does not permit a full judicial finding on obscenity, but restricts a court to a finding of probable cause. Moreover, even if a court found the material in question non-obscene and failed to issue a § 4007 order, the Postmaster would not be barred from proceeding under § 4006, with the attendant restraints discussed.

Thus, in short, action under §§ 4006–7 may be taken which goes beyond preservation of the status quo, which fails to assure a prompt administrative decision, and which thrusts the requirement of a judicial determination on the defendant.

Third, contrary to the Government's central argument, the statutes impose a direct restraint on the distribution of the allegedly obscene materials. We reject the Government's argument that its actions are aimed only at remittances, not at distribution of obscene materials. *See, Milwaukee Publishing Co.* v. *Burleson,* 255 U.S. 407, 437 (1921) (Holmes, J., dissenting); *Standard v. Olesen,* 74 S. Ct. 768, 771 (1954) (Douglas, J., as Circuit Judge). Any action aimed at remittances received for material will have a direct restraint on distribution of the material itself. A defendant is likely to restrict or end distribution of material as to which a § 4007 order has been obtained, or as to which a § 4006 proceeding is pending. The United States may not accomplish by indirection, through action against remittances, what it cannot do directly. The United States urges that the predecessor to § 4006 has been upheld against constitutional

assault by the courts. However, the decisions cited either go off on other grounds or give little if any consideration to the constitutional issue raised. Thus, in *Tourlanes Publishing Co.* v. *Summerfield,* 231 F. 2d 773 (D.C.A. 1956), *cert. denied,* 352 U.S. 912, cited by the United States, the court specifically stated they were not reaching the "difficult constitutional issues raised" by the cross-appeal, concerning the Postmaster General's refusal to deliver all of Tourlanes' mail. 231 F. 2d at 775. *Glanzman* v. *Finkle,* 150 F. Supp. 823 (E.D.N.Y. 1957), assumes the constitutionality of the predecessor to § 4006, citing *Summerfield* v. *Sunshine Book Co.,* 211 F. 2d 42 (D.C.A. 1954), *cert. denied,* 349 U.S. 921, yet the latter case, also cited by the Government, did not fully consider the constitutional questions, 221 F. 2d at 48, but concentrated on the breadth of the Postmaster's order. Moreover, these preceded *Freedman* v. *Maryland, supra,* and many of the other cases imposing strict procedural requirements on Government censorship. *See, e.g., A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1964); *Poulos* v. *Rucker,* 288 F. Supp. 305 (M.D. Ala. 1968); *Cambist Films, Inc.* v. *Tribell,* 293 F. Supp. 407 (E.D. Ky. 1968); *Cambist Films, Inc.* v. *State of Illinois,* 292 F. Supp. 185 (N.D. Ill. 1968); *Metzger* v. *Pearcy,* 393 F. 2d 202 (7th Cir. 1968); *Tyrone, Inc.* v. *Wilkinson,* 294 F. Supp. 1330 (E.D. Va. 1969); *Bee See Books, Inc.* v. *Leary,* 291 F. Supp. 622 (S.D.N.Y. 1968). The most recent court to consider § 4006, a three-judge court in *Rizzi* v. *Blount,* No. 69–64–R, June 10, 1969, C.D. Cal. (per curiam), held it unconstitutional on its face as contrary to *Freedman, supra,* and *Lamont, supra.* Our discussion here, concerning §§ 4006, 4007, supports that court's conclusion.

We understand the concern of Congress and the Post Office to restrict the flow of obscenity through

the mails. It may perhaps be true that criminal punishment for mailing obscenity under 18 U.S.C. § 1461 is an inadequate weapon in the Postmaster General's arsenal. However, it is vital that prompt judicial review on the issue of obscenity—rather than merely probable cause—be assured on the Government's initiative before the severe restrictions in §§ 4006, 4007, are invoked.

In the instant case, the defendant can only get full judicial review on the question of obscenity—by which the Postmaster would be actually bound—after lengthy administrative proceedings, and then only by his own initiative. During the interim, the prolonged threat of an adverse administration [sic] decision in § 4006 or the reality of a sweeping § 4007 order, will have a severe restriction on the exercise of defendant's First Amendment rights—all without a *final* judicial determination of obscenity. Judicial participation in the finding of obscenity under the statutory scheme here is either too little (§ 4007) or too late (§ 4006).

The stautory scheme is unconstitutional and we therefore GRANT defendant's motion to dismiss and its counterclaim.

This 8th day of September, 1969.

LEWIS R. MORGAN,
United States Circuit Judge.
NEWELL EDENFIELD,
United States District Judge.
FRANK A. HOOPER,
United States Senior District Judge.

United States District Court for the Northern District of Georgia—Atlanta Division

Civil Action File No. 12812

UNITED STATES OF AMERICA AND THE POSTMASTER GENERAL

v.

THE BOOK BIN

Judgment

This action came on for hearing before the Court, Honorable Lewis R. Morgan, U.S. Circuit Judge, and Honorable Newell Edenfield and Honorable Frank A. Hooper, United States District Judges, presiding, and the issues having been duly heard and a decision having been duly rendered, granting defendant's motion to dismiss and its counterclaim. It is Ordered and Adjudged that judgment is hereby entered for the defendant, The Book Bin, and against plaintiffs, United States of America and The Postmaster General; and that the defendant recover of the plaintiffs its costs of action.

Dated at Atlanta, Georgia, this 16th day of October, 1969.

CLAUDE L. GOZA,
Clerk of Court.
By: RUTH M. STILWELL,
Deputy Clerk.

APPENDIX C

39 U.S.C. 4006 provides:

§ 4006. "UNLAWFUL" MATTER.

Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances of money or property of any kind through the mail for an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or causing to be deposited in the United States mail information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or to his representative, to return the registered letters or other letters or mail to the sender marked "Unlawful"; and

(2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes. (Pub. L. 86–682, Sept. 2, 1960, 74 Stat. 655.)

39 U.S.C. 4007 provides:

§ 4007. DETENTION OF MAIL FOR TEMPORARY PERIODS.

(a) In preparation for or during the pendency of proceedings under sections 4005 and 4006 of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Post-

master General and upon a showing of probable cause to believe the statute is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incoming mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom. The district court may provide in the order that the detained mail be open to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity. An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings.

(b) This section does not apply to mail addressed to publishers of publications which have entry as second class matter, or to mail addressed to the agents of those publishers. (Pub. L. 86–682, Sept. 2, 1960, 74 Stat. 655; Pub. L. 87–646, § 10, Sept. 7, 1962, 76 Stat. 444.)

Part 952 of 39 C.F.R. provides:

RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO FRAUD, LOTTERY AND OBSCENITY ORDERS UNDER 39 U.S.C. 4003, 4005, AND 4006

§ 952.1 Authority for rules.

These rules of practice are issued by the Judicial Officer of the Post Office Department (see § 952.26) pursuant to authority delegated by the Postmaster General.

§ 952.2 Scope of rules.

These rules of practice shall be applicable in all formal proceedings before the Post Office Department initiated under or pertaining to 39 U.S.C. 4003, 4005, and 4006, including such cases instituted under prior rules of practice pertaining to these or predecessor statutes, unless timely shown to be prejudicial to the respondent.

§ 952.3 Informal dispositions.

These rules do not preclude the disposition of any matter by agreement between the parties either before or after the filing of a complaint when time, the nature of the proceeding, and the public interest permit.

§ 952.4 Office, business hours.

The offices of the officials mentioned in these rules are located at the Post Office Department, 12th and Pennsylvania Avenue NW., Washington 25, D.C., and are open Monday through Friday from 8:45 a.m. to 5:15 p.m.

§ 952.5 Complaints.

When the General Counsel of the Post Office Department or his designated representative believes that a person (1 U.S.C. 1) is using the mails in a manner requiring formal administrative action under 39 U.S.C. 4005 or 4006, he shall prepare and file with the Docket Clerk a complaint which names the person involved; states the legal authority and jurisdiction under which the proceeding is initiated; states the facts in a manner sufficient to enable the person named therein to make answer thereto; and recommends the issuance of an appropriate order. The person so named in the complaint shall be known as the respondent.

§ 952.6 Interim impounding.

In preparation for or during the pendency of a proceeding initiated under 39 U.S.C. 4005 or 4006, mail addressed to a respondent may be impounded upon obtaining an appropriate order from a United States District Court, as provided in 39 U.S.C. 4007, as amended by 74 Stat. 553 (Public Law 86–673).

§ 952.7 Notice of hearing.

When a complaint is filed the Docket Clerk shall issue a notice of hearing stating the time and place of the hearing and the date for filing an answer which shall not exceed 15 days from

the service of the complaint, and a reference to the effect of failure to file an answer or appear at the hearing. (See §§ 952.10 and 952.11) Whenever practicable, the hearing date shall be within 30 days of the date of the notice.

§ 952.8 Service.

(a) The Docket Clerk shall cause a notice of hearing and a copy of the complaint to be transmitted to the postmaster at any office of address of the respondent or to the inspector in charge of any division in which the respondent is doing business, which shall be delivered to the respondent or his agent by said postmaster or a supervisory employee of his post office or a postal inspector. A receipt acknowledging delivery of the notice shall be secured from the respondent or his agent and forwarded to the Docket Clerk, Room 3350, Post Office Department, Washington 25, D.C., to become a part of the official record.

(b) In the event no person can be found to accept service of the notice of hearing and complaint pursuant to paragraph (a) of this section, the notice may be delivered in the usual manner as other mail addressed to the respondent. A statement, showing the time and place of delivery, signed by the postal employee who delivered the notice of hearing shall be forwarded to the Docket Clerk and constitute evidence of service.

§ 952.9 Filing documents for the record.

(a) Each party shall file with the Docket Clerk pleadings, motions, orders and other documents for the record. The Docket Clerk shall cause copies to be delivered promptly to other parties to the proceeding and to the presiding officer.

(b) The parties shall submit four copies of all documents unless otherwise ordered by the presiding officer. One copy shall be signed as the original.

(c) Documents shall be dated and state the docket number and title of the proceeding. Any pleading or other document required by order of the presiding officer to be filed by a specified date shall be delivered to the Docket Clerk on or before such date. The date of filing shall be entered thereon by the Docket Clerk.

§ 952.10 Answer.

(a) The answer shall contain a concise statement admitting, denying, or explaining each of the allegations set forth in the complaint.

(b) Any facts alleged in the complaint which are not denied or are expressly admitted in the answer may be considered as proved, and no further evidence regarding these facts need be adduced at the hearing.

(c) The answer shall be signed personally by an individual respondent, or in the case of a partnership by one of the partners, or, in the case of a corporation or association, by an officer thereof.

(d) The answer shall set forth the respoondent's address and the name and address of his attorney.

(e) The answer shall affirmatively state whether the respondent will appear in person or by counsel at the hearing.

(f) If the respondent does not desire to appear at the hearing in person or by counsel he may request that the matter be submitted for determination pursuant to paragraph (b) of § 952.11.

§ 952.11 Default.

(a) If the respondent fails to file an answer within the time specified in the notice of hearing, he shall be deemed in default, and to have waived hearing and further procedural steps. The Judicial Officer shall thereafter issue an order without further notice to the respondent.

(b) If the respondent files an answer but fails to appear at the hearing, the presiding

officer shall receive complainant's evidence and render an initial decision.

§ 952.12 Amendment of pleadings.

(a) Amendments proposed prior to the hearing shall be filed with the Docket Clerk. Amendments proposed thereafter shall be filed with the presiding officer.

(b) By consent of the parties a pleading may be amended at any time. Also, a party may move to amend a pleading at any time prior to the close of the hearing and, provided that the amendment is reasonably within the scope of the proceeding initiated by the complaint, the presiding officer shall make such ruling on the motion as he deems to be fair and equitable to the parties.

(c) When issues not raised by the pleadings but reasonably within the scope of the proceedings initiated by the complaint are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments as may be necessary to make the pleadings conform to the evidence and to raise such issues shall be allowed at any time upon the motion of any party.

(d) If a party objects to the introduction of evidence at the hearing on the ground that it is not within the issues made by the pleadings, but fails to satisfy the presiding officer that an amendment of the pleadings would prejudice him on the merits, the presiding officer may allow the pleadings to be amended and may grant a continuance to enable the objecting party to rebut the evidence presented.

(e) The presiding officer may, upon reasonable notice and upon such terms as are just, permit service of a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented and which are relevant to any of the issues involved.

§ 952.13 Continuances and extensions.

Continuances and extensions will not be granted by the presiding officer except for good cause shown.

§ 952.14 Hearings.

Hearings are held in Room 5241, Post Office Department, Washington 25, D.C., or other locations designated by the presiding officer.

§ 952.15 Change of place of hearings.

Not later than the date fixed for the filing of the answer, a party may file a request that a hearing be held to receive evidence in his behalf at a place other than that designated for hearing in the notice. He shall support his request with a statement outlining:

(a) The evidence to be offered in such place;

(b) The names and addresses of the witnesses who will testify;

(c) The reasons why such evidence cannot be produced at Washington, D.C.

The presiding officer shall give consideration to the convenience and necessity of the parties and the relevancy of the evidence to be offered.

§ 952.16 Appearances.

(a) A respondent may appear and be heard in person or by attorney.

(b) An attorney may practice before the Department in accordance with applicable rules issued by the Judicial Officer. See Part 951 of this chapter.

(c) When a respondent is represented by an attorney, all pleadings and other papers subsequent to the complaint shall be mailed to the attorney.

(d) A respondent must promptly file a notice of change of attorney.

§ 952.17 Presiding officers.

(a) The presiding officer at any hearing shall be a Hearing Examiner qualified pursuant to

the Administrative Procedure Act (5 U.S.C. 1010) or the Judicial Officer (74 Stat. 553, P.L. 86-676). The Chief Hearing Examiner shall assign cases to Hearing Examiners upon rotation so far as practicable. The Judicial Officer may, for good cause shown, preside at the reception of evidence in proceedings where expedited hearings are requested by either party.

(b) The presiding officer shall have authority to:

(1) Administer oaths and affirmations;

(2) Examine witnesses;

(3) Rule upon offers of proof, admissibility of evidence and matters of procedure;

(4) Order any pleading amended upon motion of a party at any time prior to the close of the hearing;

(5) Maintain discipline and decorum and exclude from the hearing any person acting in an indecorous manner;

(6) Require the filing of briefs or memoranda of law on any matter upon which he is required to rule;

(7) Order pre-hearing conferences for the purpose of the settlement or simplification of issues by the parties;

(8) Order the proceeding re-opened at any time prior to his decision for the receipt of additional evidence;

(9) Render an initial decision, which becomes the final Departmental decision unless a timely appeal is perfected: the Judicial Officer may issue a tentative or a final decision.

§ 952.18 Evidence.

(a) Except as otherwise provided in these rules, the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern. However, such rules may be relaxed to the extent that the presiding officer deems proper to insure a fair hearing. The presiding officer shall

exclude irrelevant, immaterial or repetitious evidence.

(b) Testimony shall be under oath or affirmation and witnesses shall be subject to cross-examination.

(c) Agreed statements of fact may be received in evidence.

(d) Official notice or knowledge may be taken of the types of matters of which judicial notice or knowledge may be taken.

(e) Authoriative writings of the medical or other sciences, may be admitted in evidence but only through the testimony of expert witnesses or by stipulation.

(f) Lay testimonials will not be received in evidence as proof of the efficacy or quality of any product or thing sold through the mails.

(g) The written statement of a competent witness may be received in evidence provided that such statement is relevant to the issues, that the witness shall testify under oath at the hearing that the statement is in all respects true, and, in the case of expert witnesses, that the statement correctly states his opinion or knowledge concerning the matters in question.

(h) A party who objects to the admission of evidence shall make a brief statement of the grounds for the objection. Formal exceptions to the rulings of the presiding officer are unnecessary.

§ 952.19 Subpoenas.

The Post Office Department is not authorized by law to issue subpoenas requiring the attendance or testimony of witnesses.

§ 952.20 Witness fees.

The Post Office Department does not pay fees and expenses for respondent's witnesses or for depositions requested by respondent.

§ 952.21 Depositions.

(a) Not later than five days after the filing of respondent's answer, any party may file application with the Docket Clerk for the taking of testimony by deposition. In support of such application the applicant shall submit under oath or affirmation a statement setting out the reasons why such testimony should be taken by deposition, the time and the place, and the name and address of the witness whose deposition is desired, the subject matter of the testimony of each witness, its relevancy, and the name and address of the person before whom the deposition is to be taken.

(b) If the application be granted, the order for the taking of the deposition will specify the time and place thereof, the name of the witness, the person before whom the deposition is to be taken and any other necessary information.

(c) Each witness testifying upon deposition shall be duly sworn, and the adverse party shall have the right to cross-examine. The questions and answers together with all objections, shall be reduced to writing and, unless waived by stipulation of the parties, shall be read to and subscribed by the witness in the presence of the deposition officer who shall certify it in the usual form. The deposition officer shall file the testimony taken by deposition as directed in the order. The deposition officer shall put the witness on oath. All objections made at the time of examination shall be noted by the deposition officer and the evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, a party may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim. Objections to relevancy or materiality of testimony, or to errors and irregularities occurring at the oral exami-

nation in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties and errors of any kind which might be obviated, cured or removed if promptly presented, are waived unless timely objection is made at the taking of the deposition.

(d) At the hearing any part or all of the deposition may be offered in evidence by any party who was present or represented at the taking of the deposition or who had notice thereof. If the deposition is not offered and received in evidence, it shall not be considered as a part of the record in the proceeding. The admissibility of depositions or parts thereof shall be governed by the rules of evidence.

(e) The party requesting the deposition shall pay all fees required to be paid to witnesses and the deposition officer, and shall provide an original and one copy of the deposition for the official record, and shall serve one copy upon the opposing party.

(f) Within the United States or within a territory or insular possession, subject to the dominion of the United States, depositions may be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held; within a foreign country, depositions may be taken before a secretary of an embassy or legation, consul general, vice consul or consular agent of the United States, or any other person designated in the order for the taking of a deposition.

(g) Depositions may also be taken and submitted on written interrogatories in substantially the same manner as depositions taken by oral examination. When a deposition is taken upon written interrogatories and cross-interrogatories, none of the parties shall be present or represented, and no person, other than the wit-

ness, a stenographic reporter, and the officer shall be present at the examination of the witness, which fact shall be certified by the officer, who shall propound the interrogatories and cross-interrogatories to the witness in their order and reduce the testimony to writing in the witness' own words.

§ 952.22 Transcript.

(a) Hearings shall be stenographically reported by a contract reporter of the Post Office Department under the supervision of the assigned presiding officer. Argument upon any matter may be excluded from the transcript by order of the presiding officer. A copy of the transcript shall be a part of the record and the sole official transcript of the proceeding. Copies of the transcript shall be supplied to the parties to the proceeding by the reporter at rates not to exceed the maximum rates fixed by contract between the Post Office Department and the reporter. Copies of parts of the official record other than the transcript may be obtained by the respondent from the reporter upon the payment to him of a reasonable price therefor.

(b) Changes in the official transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. No physical changes shall be made in or upon the official transcript, or copies thereof, which have been filed with the record. Within 10 days after the receipt by any party of a copy of the official transcript, or any part thereof, he may file a motion requesting correction of the transcript. Opposing counsel shall, within such time as may be specified by the presiding officer, notify the presiding officer in writing of his concurrence or disagreement with the requested corrections. Failure to interpose timely objection to a proposed correction shall be considered to be concurrence. Thereafter, the presiding officer shall by order specify the cor-

rections to be made in the transcript. The presiding officer on his own initiative may order corrections to be made in the transcript with prompt notice to the parties of the proceeding. Any changes ordered by the Hearing Examiner other than by agreement of the parties shall be subject to objection and exception.

§ 952.23 Proposed findings and conclusions.

(a) Each part to a proceeding, except one who fails to answer the complaint or having answered, either fails to appear at the hearing or indicates in the answer that he does not desire to appear, may, unless at the discretion of the presiding officer such is not appropriate, submit proposed findings of fact, conclusions of law and supporting reasons either in oral or written form in the discretion of the presiding officer. The presiding officer may also require parties to any proceeding to submit proposed findings of fact and conclusions of law with supporting reasons. Unless given orally the date set for filing of proposed findings of fact and conclusions of law shall be within 15 days after the delivery of the official transcript to the Docket Clerk who shall notify both parties of the date of its receipt. The filing date for proposed findings shall be the same for both parties. If not submitted by such date, or unless extension of time for the filing thereof is granted, they will not be included in the record or given consideration.

(b) Except when presented orally before the close of the hearing, proposed findings of fact shall be set forth in serially numbered paragraphs and shall state with particularity all evidentiary facts in the record with appropriate citation to the transcript or exhibits supporting the proposed findings. Each proposed conclusion shall be separately stated.

§ 952.24 Decisions.

(a) *Initial decision by hearing examiner.* A written initial decision shall be rendered with all due speed. The initial decision shall include findings and conclusions, with the reasons therefor, upon all the material issues of fact or law presented on the record, and the appropriate order or denial thereof. The initial decision shall become the final Departmental decision unless an appeal is perfected in accordance with § 952.25.

(b) *Tentative or final decision by the Judicial Officer.* When the Judicial Officer presides at the hearing he shall issue a final or a tentative decision. Such decision shall include findings and conclusions, with the reasons therefor, upon all the material issues of fact or law presented on the record, and the appropriate order or denial thereof. The tentative decision shall become the final Departmental decision unless exceptions are filed in accordance with § 952.25.

(c) *Oral decisions.* The presiding Officer may render an oral decision (an initial decision by a hearing examiner, or a tentative or final decision by the Judicial Officer) at the close of the hearing when the nature of the case and the public interest warrant. A party who desires an oral decision shall notify the presiding officer and the opposing party at least 5 days prior to the date set for the hearing. Either party may submit proposed findings and conclusions either orally or in writing at the conclusion of the hearing.

§ 952.25 Exceptions to initial decision or tentative decision.

(a) A party in a proceeding presided over by a hearing examiner, except a party who failed to file an answer, may appeal to the Judicial Officer by filing exceptions in a brief on appeal within 15 days from the receipt of the examiner's initial decision.

(b) A party in a proceeding presided over by the Judicial Officer, except one who has failed to file an answer, may file exceptions within 15 days from the receipt of the Judicial Officer's tentative decision.

(c) If an initial or tentative decision is rendered orally by the presiding officer at the close of the hearing, he may then orally give notice to the parties participating in the hearing of the time limit within which an appeal must be filed.

(d) Upon receipt of the brief on appeal from an initial decision of a hearing examiner, the docket clerk shall promptly transmit the record of the proceedings to the Judicial Officer. The date for filing the reply to an appeal brief or to a brief in support of exceptions to a tentative decision by the Judicial Officer is 10 days after the receipt thereof. No additional briefs shall be received unless requested by the Judicial Officer.

(e) Briefs upon appeal or in support of exceptions to a tentative decision by the Judicial Officer shall be filed in triplicate with the Docket Clerk and contain the following matter in the order indicated:

(1) A subject index of the matters presented, with page references; a table of cases alphabetically arranged; a list of statutes and texts cited with page references.

(2) A concise abstract or statement of the case.

(3) Numbered exceptions to specific findings and conclusions of fact or conclusions of law of the presiding officer.

(4) A concise argument clearly setting forth points of fact and of law relied upon in support of each exception taken, together with specific references to the parts of the record and the legal or other authorities relied upon.

(f) Unless permission is granted by the Judicial Officer no brief shall exceed fifty printed or one hundred typewritten pages double spaced.

(g) The Judicial Officer will extend the time to file briefs only upon written application for good cause shown. The Docket Clerk shall promptly notify the applicant of the decision of the Judicial Officer on the application. If the appeal brief or brief in support of exceptions is not filed within the time prescribed, the defaulting party will be deemend to have abandoned the appeal or waived the exceptions, and the initial or tentative decision shall become the final Departmental decision.

§ 952.26 Judicial Officer.

The Judicial Officer is authorized (a) to act as presiding officer at hearings, (b) to render tentative decisions, (c) to render final Departmental decisions, (d) to issue Departmental orders for the Postmaster General, (e) to refer the record in any proceeding to the Postmaster General or the Deputy Postmaster General for final Departmental decision and (f) to revise or amend these rules of practice. The entire official record will be considered before a final Departmental decision is rendered. Before rendering a final Departmental decision, the Judicial Officer may order the hearing reopened for the presentation of additional evidence by the parties.

§ 952.27 Motion for reconsideration.

Within 10 days from the date thereof, or such longer period as may be fixed by the Judicial Officer, either party may file a motion for reconsideration of a final Departmental decision. Each motion for reconsideration shall be accompanied by a brief clearly setting forth the points of fact and of law relied upon in support of said motion.

§ 952.28 Orders.

If an order is issued which prohibits delivery of mail to a respondent it shall be incorporated in the record of the proceeding. The Docket Clerk shall cause the order to be published in the Postal Bulletin and transmitted to such postmasters and other officers and employees of the postal service as may be required to place the order into effect.

§ 952.29 Modification or revocation of orders.

A party against whom an order has been issued may file an application for modification or revocation thereof. The Docket Clerk shall transmit a copy of the application to the General Counsel, who shall file a written reply. A copy of the reply shall be sent to the applicant by the Docket Cerk. Thereafter an order granting or denying such application will be issued by the Judicial Officer.

§ 952.30 Supplemental orders.

When the General Counsel or his designated representative shall have reason to believe that a person is evading or attempting to evade the provisions of any such order by conducting the same or a similar enterprise under a different name or at a different address he may file a petition with accompanying evidence setting forth the alleged evasion or attempted evasion and requesting the issuance of a supplemental order against the name or names allegedly used. Notice shall then be given by the Docket Clerk to the person that the order has been requested and that an answer may be filed within ten days of the notice. The Judicial Officer, for good cause shown, may hold a hearing to consider the issues in controversy, and shall, in any event, render a final decision granting or denying the supplemental order.

§ 952.31 Computation of time.

A designated period of time under these rules excludes the day the period begins, and includes the last day of the period unless the last day is a Saturday, Sunday or legal holiday, in which event the period runs until the close of business on the next business day.

§ 952.32 Official record.

The transcript of testimony together with all pleadings, orders, exhibits, briefs and other documents filed in the proceeding shall constitute the official record of the proceeding.

§ 952.33 Public information.

The Law Librarian of the Post Office Department maintains for public inspection in the Law Library copies of all initial, tentative and Departmental decisions. The Docket Clerk maintains the complete official record of every proceeding.

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